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82-577

No.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

CAMPBELL INDUSTRIES, INC.;
ELDORADO INSURANCE CO., PETITIONERS

v.

DIRECTOR, OFFICE OF WORKERS'
COMPENSATION PROGRAMS, UNITED
STATES DEPARTMENT OF LABOR, ET AL.

PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether it is error to interpret a statute providing:

> "In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide... compensation for one hundred and four weeks only"

as requiring the employer to prove on the issue of existence of preexistent "permanent partial disability" that

> "...the claimant (had) a manifest physically disabling condition serious enough to motivate a cautious employer to discharge him rather than incur the possibility of incurred liability";
>
> that the employer did "treat the claimant as disabled";
>
> that the employer did treat the claimant "differently after previous injuries";
>
> that the disability not be "asymptomatic"; and
>
> that the disability (psychological)

be "severe psychological problems".

2. Whether it is error and departure from accepted and usual judicial proceedings to reinstate a trial judge's determination that claimant's "disability" was due "solely to the injury," without examination of the evidence, when it was uncontroverted that the trial judge erred in his belief that pre-existing "permanent partial disability" must be economically disabling.

3. Whether there has been departure from accepted and usual judicial proceedings and abuse of judicial discretion by apparent adoption of a party's arguments of existence of "findings of fact" not existent in the record; absence of evidence when evidence is evident in the record and existence of findings of fact resolving "conflicting evidence" when on the issues in question there is no conflict in the evidence.

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Campbell Industries, Inc., and its workers' compensation insurance carrier, Eldorado Insurance Company, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

Order Denying Respondents' Petition for Rehearing (App. E, infra, 1e) is not reported.

The opinion of the Court of Appeals (App. D, infra, 1d-15d) is reported at 678 F.2d 836 (1982), 14 BRBS 974.

The Decision and Order of the Benefits Review Board (App. C, infra, 1c-10c) is reported at 13 BRBS 227.

The Decision and Order of the Administrative Law Judge (App. A, infra, 1a-31a)

The Amended Decision and Order of the Administrative Law Judge (App. B, infra, 1b-3b).

JURISDICTION

The opinion of the Court of Appeals (App. D, infra, 1d-15d) was entered on June 4, 1982. A petition for rehearing was denied on July 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). The jurisdiction of the Court of Appeals was invoked under 33 U.S.C. 921(c).

STATUTORY PROVISIONS INVOLVED

1. §902(10) of the Longshoremen's and Harbor Workers' Compensation Act, as amended effective November 26, 1972, 33 U.S.C. 902(10) provides in part:

> "(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury

in the same or any other employment."

2. §908(f) of the Longshoremen's and Harbor Workers' Compensation Act, as amended November 26, 1972, 33 U.S.C. 908(f)(1) provides in part:

> "(f) Injury increasing disability: (1) In any case in which an employee having an existing permanent partial disability suffers injury, the employer shall provide compensation for such disability as is found to be attributable to that injury based upon the average weekly wages of the employee at the time of the injury....
>
> "In all other cases in which the employee has a permanent partial disability, found not to be due solely to that injury, and such disability is materially and substantially greater than that which would have resulted from the subsequent injury alone, the employer shall provide...compensation for one hundred and four weeks only."

3. §949 of such Act, 33 U.S.C. 949 provides in part:

> "Discrimination Against Employees Who Bring Proceedings. It shall be unlawful for any employer or his duly authorized agent to discharge or in any other manner discriminate against an employee

as to his employment because such employee has claimed or attempted to claim compensation from such employer...Any employee so discriminated against shall be restored to his employment and shall be compensated by his employer for any loss of wages arising out of such discrimination..."

STATEMENT

Claimant Lostaunau, a 41 year old waysman, sustained low back strain while shoveling sand during the course of his employment by petitioner, Campbell Industries, on September 16, 1973. Claimant also sustained four previous injuries to his back with the same employer then insured by another workers' compensation insurance carrier, these occurring January 27, 1971; April 26, 1971; April 13, 1972 and December 12, 1972. At time of trial, he claimed that he was totally and permanently disabled as a consequence of these five injuries due to orthopedic and psychiatric disability.

The employer and insurance carriers disputed the claim of disability maintaining

that claimant was employable and had residual wage-earning capacity within the meaning of §908(c)(21), (h) of the Act.

The instant petitioners also raised the issue, here presented, that should there be finding of permanent disability, that their liability therefore was limited to 104 weeks of compensation on the grounds that the claimant had permanent and partial disability both of an orthopedic and psychiatric nature prior to the injury of September 16, 1973 and that any existing disability is materially and substantially greater than that which would have resulted from the injury of September 16, 1973 alone.

The evidence on that issue insofar as the back claim is concerned was the circumstance that claimant had four prior claims of record with the same employer.

In conjunction with one of those claims, report of O. S. Harbaugh, M.D., to the employer under date of April 17, 1972, reported in part:

> "On April 13, 1972, he picked up a plank and had pain in his

low back...Previous history of back injury. He was treated at Campbell for this and did not see a M.D."

Under "Nature and Extent of Disease", the doctor reported:

"Sprain, lumbosacral spine, acute and moderately severe."

At paragraph 13 under "X-rays", there is included:

"Lateral scoliosis and compensatory curve in the thoracic spine."

Claimant's former supervisor testified that claimant, during the course of his employment, had complained of his back hurting and that the claimant had a reputation of having hurt his back.

Claimant in his deposition three times acknowledged that his back symptomatology had existed ever since the time of his first back injury. At time of trial, claimant denied such history maintaining that his back pain stemmed from his injury of September 16, 1973 (on which there was no statute of limitations defense and a higher compensation rate).

Medical evidence consisted of report

from claimant's examining orthopedist, Richard Saar, M.D., who in a report of March 29, 1979 at page 4 stated in part:

> "2. Degenerative disc disease. A man of 41 with a significant degree of scoliosis this man shows may be expected to have considerable degenerative disc disease...On the basis of his work record, the lack of symptomatology prior to the industrial accidents, it must be concluded that this condition was asymptomatic and nondisabling prior to the series of industrial accidents and, as a result of those accidents became symptomatic and disabling." [Emphasis Added]
>
> "3. Lumbar scoliosis, idiopathic. This is a moderate scoliosis and this means he has considerable deformity. It cannot be ignored as a source of disability, having been aggravated several times by the on-the-job injuries while working as a waysman."

Opinion of petitioners' physician, R. G. Lambert, M.D., was similar.

On the psychiatric issue, the evidence developed was that the claimant was born of a wealthy Peruvian family and spent his early years as a playboy, waited upon by mother and sisters. He came to the United States and followed the same lifestyle for about two years

when suddenly cut off by his family. He was forced to go to work as a dishwasher and busboy. He married an older woman and became a radio announcer for a Spanish speaking station. He met and moved away with a 16 year old girl whom he then married and thereafter, after working as a janitor, went to work for employer as a waysman, a term for a shipyard laborer. He regarded all of this laboring type of work as beneath his station.

Claimant's initial evaluating psychiatrist, Dr. Northrup, testified in his deposition that the stresses in this man's life were longitudinal and that "these are the evidences of this man having a personality or propensity not to handle stress as well as other people." He further testified that claimant's psychological state had been manifested by his poor work record, lack of maturity and dependence on family.

Dr. Graner, petitioners' last evaluating psychiatrist, diagnosed the claimant as having a passive dependent personality which would

have been characterized by not wanting to work, wanting to find some other way to be cared for financially. He further testified that had the employer, at time of hire, had psychiatrically examined Mr. Lostaunau, that such diagnosis would have been evident.

Claimant's former supervisor, Mr. Becerra, testified that the claimant during his work, if not watched, would "disappear on you"; was a below average worker; could not work without supervision, and if not constantly watched would not work. He then concluded by stating:

> "Well he wasn't very dependable either. He hardly showed up for work, missed a lot of work."

Dr. Graner testified that in view of claimant's preexisting passive-dependent personality (prior to his injury of September 1973 and assuming further that thereafter he has suffered some degree of depression) that such depression is of greater degree than would have otherwise occurred in the absence of the underlying preexisting passive-dependent personality thereafter stating:

> "I think there is greater depression that there would have been otherwise because dependent people expect more. They're more often disappointed and when they are disappointed they are more depressed."

On the issue of permanent disability there was conflicting medical evidence as to the degree of disability. Mr. Lostaunau testified that he was able to work at a variety of jobs established by the employer to be available to him in the open labor market.

The trial judge in Decision and Order of October 12, 1979, determined that based upon conflicting medical opinion and resolving doubts in claimant's favor, that claimant was permanently and totally disabled.

The judge then went on to state in part:

> "My impression is that the claimant is a pathetic former 'playboy' from an economically advantaged Peruvian family who is preoccupied with his adult loss of status which has forced him to perform work beneath what he feels is his 'station'. His lack of self-esteem is not without foundation. He has a life long history of being the beneficiary of symbiotic relation-

> ships. I do not doubt that his personality disorder is a life long condition but prior to September 16, 1973, he exhibited a capacity to cope and function in an employment situation however unsuited and unsavory...
>
> "If this case were limited to the orthopedic findings I would not find claimant permanently and totally disabled as I feel that he is physically capable of securing employment in retail sales, hotel work or banking in the San Diego area which is presently available...
>
> "However, this case is not limited to claimant's orthopedic impairment but is more significantly related to his psychiatric impairment...."

After reviewing the evidence on the issue of disability, the judge concluded:

> "Such permanent total disability is solely the proximate result of the injury of September 16, 1973."

The court then turned to petitioners' claim for §8(f) relief stating that the employer must show that (1) claimant had an existing permanent partial disability prior to the injury of September 16, 1973; (2) such disability was manifest to the employer; and that (3) the current disability is not due

solely to the subsequent injury of September 16, 1973.

The judge then stated:

> "The evidence is clear herein that claimant never had an existing permanent partial disability prior to the injury of September 16, 1973. The personality disorder which may have been of life long duration was not a 'disability' within the meaning of section 2(10) of the Act which defines disability as meaning an incapacity because of injury to earn wages. Clearly, claimant was perfectly capable of employment and of coping prior to the injury of September 16, 1973. He was not economically disabled. Secondly, such disability was not manifest to the employer....
>
> "...Finally, I conclude that claimant's current disability is due solely to the injury of September 16, 1973. Section 8(f) of the Act is not applicable."

From such Decision, petitioners filed Petition for Review with the Benefits Review Board.

Petitioners urged that the trial court had erred as a matter of law in denying petitioners §8(f) relief because of the trial judge's mistaken assumption that preexisting "partial disability" had to be economic in

nature citing Atlantic & Gulf Stevedores, Inc., v. Director, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976); Nacirema Operating Co. v. Benefits Review Board, 538 F.2d 73, 4 BRBS 190 and Equitable Equipment Co. v. Hardy, 548 F.2d 1192, 6 BRBS 666 (5th Cir. 1977).

Petitioners also urged that the uncontroverted evidence indicated that claimant's orthopedic and psychiatric disability was manifest to the employer prior to the injury of September 1973.

The Benefits Review Board granted petition on this issue and in Decision and Order dated February 23, 1981 stated in part:

> "Our review of the administrative law judge's decision indicates that his findings of no pre-existing disability was based on the fact that claimant was able to work prior to his September 16, 1973, injury. However, there is no requirement that the preexisting condition be economically disabling for Section 8(f) to apply...
>
> "....
>
> "Our review of the record reveals that all of the evidence supports a finding that claimant had a

> preexisting permanent partial disability as required by the C & P Telephone test....
>
> "Similarly, the evidence indicates that claimant's existing permanent partial disabilities were manifest to employer and that all the doctors attributed at least some of the claimant's disability, both psychiatric and orthopedic, to his pre-September 16, 1973, condition.
>
> "Accordingly, the administrative law judge should have found employer entitled to relief under Section 8(f) of the Act."

The Director filed Petition for Review with the Court of Appeals for the Ninth Circuit alleging that the Benefits Review Board had exceeded its scope of review of the administrative law judge's decision and as to whether the employer had met the requirements for relief under §8(f).

The Director argued that the findings on 8(f) were predicated upon disputed evidence which could support more than one result; that the administrative law judge's findings were supported by substantial evidence and could not be disturbed by the Benefits Review Board.

Petitioners herein responded that the trial judge's findings were predicated upon erroneous definition of preexisting "partial disability" and that the Benefits Review Board had merely applied the correct standard to the undisputed facts.

The Court of Appeals on the first issue determined:

> "The Board is not at liberty to reweigh the evidence and substitute its own view."

The court in reviewing the three findings of the administrative law judge on the issue stated in part:

> "Although the administrative law judge applied an economic disability standard, his finding should be upheld because the employer did not meet the more liberal test applied in C & P Telephone, 564 F.2d at 513. The claimant did not have a manifest, physically disabling condition serious enough to motivate a cautious employer to discharge him rather than incur the possibility of incurred liability. This was a finding of fact." [There is no such finding of fact in the record.]

The court went on to conclude:

> "Because the record in this case

> contains conflicting evidence and this determination is a factual one, we uphold the administrative law judge's determination."

Then in examining the manifest test, the court concluded in part:

> "Campbell had no medical records before the 1973 injury which show that the claimant had degenerative disc disease or psychological problems. Although the claimant had three back injuries, he was released for work each time. His back condition was asymptomatic until 1973. All the medical reports cited by the Board were after the 1973 injury. Furthermore, Campbell did not treat the claimant any differently after the other back injuries. The claimant resumed his normal work activities.
>
> "...there was almost no objective basis for determining that he had severe psychological problems. These problems did not appear until after the 1973 injury when the claimant could no longer work. Only one psychiatrist testified that the employer could have discovered claimant's condition through a psychological test. There were no psychological symptoms manifested by the claimant."

The court then affirms the administrative law judge's determination that "claimant's total disability was due solely to the 1973

orthopedic injury combined with psychiatric impairment" stating further "the administrative law judge's finding in this case is based on conflicting evidence" and is supported by "substantial evidence." "The Board does not satisfactorily explain why it came to the opposite conclusion. We must affirm the factual findings of the administrative law judge."

The court's decision makes no reference to the actual record. There is no inquiry as to how the trial judge's conclusion that all disability was attributable to the September 1973 injury was supportable had he not erroneously assumed that any other or preexisting disability must be economic in nature.

REASONS FOR GRANTING THE PETITION

This case presents an excellent example of statutory erosion and rewriting of a straightforward statute, the effect of which places the employer, subject to the Longshoremen's and Harbor Workers' Compensation Act, in a catch-22 situation regarding the

hiring and retention of employees with partial disability.

The case further presents an example of confusion which can result when an appellate court attempts to review an issue of law when that "law" consists of a maze of judicially created limitations, provisos and nuances, sometimes contradictory, the application of which obscures the plain meaning of the statute and the legislative reason therefor.

This Court first interpreted the meaning of "disability", within the framework of §8(f)(1) of the Longshoremen's and Harbor Workers Compensation Act, in the case of Lawson v. Swanee Fruit & Steamship Co., 336 U.S. 198, 69 SCt. 503, 93 LEd. 611 (1949). The Court recited the legislative history leading to the enactment of §8(f) Special Fund relief to the employer. Such purpose was to prevent an employer from discriminating against the handicapped worker. Examples given in the legislative history concerned one-eyed, one-legged, one-armed men. The

Director urged that interpretation of "disability" within the meaning of §8(f) to exclude nonindustrial disability. In rejecting such contention, the Court concluded that the term "disability" was not used as a term of art in §8(f)(1) thus rejecting the contention that "disability" be interpreted in conformance with §902(2) of the Act.

The Court of Appeals in Atlantic & Gulf Stevedores, Inc. v. Director, OWCP, 542 F.2d 602, 4 BRBS 79 (3d Cir. 1976), rejected the Benefits Review Board's reasoning that the term "existing permanent partial disability" as contained in §8(f)(1), as contained in the 1972 amendment, was more restrictive than the term "previous disability" as used in the unamended Act.

The Court of Appeals, rejecting the Benefits Review Board's and Director's contention that "existing permanent partial disability" required the disability to be economically disabling stated that such an interpretation would transform §8(f) into a

catch-22 situation stating at 542 F.2d at 609:

> "Any employer who in reliance on §8(f) hired a disabled person would immediately lose the statutory limitation on his liability, since upon hiring a handicapped worker any preexisting economic disability would terminate. The result is, of course absurd, and is inconsistent with the policy objectives discussed in the Lawson case."

A case frequently cited for the opposite proposition is that of Cordero v. Triple A Machine Shop, 580 F.2d 1331, 8 BRBS 744, (9th Cir. 1978). Such decision affirmed a decision of an administrative law judge that there was no preexisting disability because of the absence of evidence that the claimant's preexisting cough interfered with his ability to perform his work.

The Court of Appeals for the Ninth Circuit in the instant decision does not make a definitive statement as to its position on this question of interpretation.

The result in the instant case gives credence to the proposition that the Court

of Appeals for the Ninth Circuit deems that "partial disability" within the meaning of §8(f) must be economically disabling. It has affirmed an administrative law judge decision predicated upon such understanding of the law.

The circumstance remains that the administrative law judge rejected preexisting "partial disability" as a causative factor (in determining sole cause) because the partial disability was "not economically disabling." No explanation to the contrary is given in the decision.

Thus, 33 years after this Court issued the Lawson decision, the lower courts and administrators appear to question or ignore the holding.

The decision in question further erodes the definition of "partial disability" by finding that it not be "asymptomatic"; that it be "severe" in degree; that the employer must treat the employee as disabled; and "treat differently" those partially disabled.

Lastly, the Court adopted the rule

of other decisions that the "partial disability" must be "serious enough to motivate discharge."

Such interpretations of "partial disability" within the meaning of §8(f)(1) requires that the employer (in the instant case) in order to obtain Special Fund relief, act in a manner which is prohibited by §949 of the Act, supra which prohibits discrimination against employees who have workers' compensation claims.

The Court of Appeals in the instant case, requires that the employer have a pre-existing "partial disability" "manifest" to the employer.

The manifest concept appears to have arisen from a series of decisions commencing with that of American Mutual Insurance Co. of Boston v. Jones, 138 U.S.App. D.C. 269, 426 F.2d 1263, 1267 (1970). Inroads have been made on the restrictive effect of such decision. For example, in the case of Director v. Universal Terminal & Stevedoring Corp., 575 F2d. 452, 8 BRBS 498 (3d Cir. 1978),

the court rejected the requirement that the employer have actual knowledge of the pre-existing partial disability and may establish that such disability is latent, the existence of which is reflected in medical records (heart disease case).

Congress wisely omitted the "manifest" concept when it enacted and reenacted this statute.

Its judicial inclusion cuts the heart out of the purpose behind the enactment of §8(f) particularly in today's workers' compensation arena in which claims predicated upon psychological injury; cardiovascular injury; pulmonary injury and various degenerative diseases are rampant.

Union rules and state and sometimes federal legislation prohibit employers from conducting preemployment and indeed post-employment physicals. In some types of industries, such as the longshore industry, the immediate need for employees precludes time for preemployment physicals.

Moreover, a most expensive and sophisticated medical examination is required to determine the existence of the underlying medical disability which might exist in the psychological, cardiovascular, pulmonary and degenerative disease categories: particularly when the employee seeks to conceal the existence of such disease.

Is §8(f) Special Fund relief to be afforded to those employers who have the good fortune to hire employees who candidly report existence of known disease processes? Are employees who are not candid able to thereby preclude to their employer subsequent 8(f) relief should such disease processes or partial disability play a part in future greater disability in conjunction with industrial injury?

Is the sophisticated wealthy employer having the capability to perform extensive pre and post-employment physicals, by which to develop evidence of "manifest", to be thus favored in the §8(f) arena over the smaller,

less sophisticated and poorer employers?

All employers and insurance carriers are taxed on a pro rata basis in order to fund the Special Fund out of which §8(f) liabilities are paid.

This Court in Potomac Electric Power Co. v. Director, Office of Workers' Compensation Programs, 449 U.S. 268, 101 SCt. 509, 66 LEd. 2d 446, 14 BRBS 363 (1980), eliminated judicially created confusion and overlap in the interpretation and application of §908(c) of the Act pertaining to scheduled disabilities. The same pruning process applied to §908(f)(1) would aid and simplify the application, administration and understanding of the apparent plain meaning of that provision.

The opinion of the Court of Appeals contains a reported "finding of fact" not contained in the record.

The opinion reports existence of administrative law judge resolution of factual conflicts not existent in the record on the issue presented.

The court does not examine facts in the record measured by correct definition of "partial disability."

The court does not remand the case to either the Benefits Review Board or to the administrative law judge to resolve these questions.

In a time when appellate court calendars are crowded with criminal and other personal due process cases, one pertaining to the efficient operation of the wheels of commerce can be disregarded with no loss of life or liberty. Yet in the absence of viable and sustaining economic community, the other questions become moot.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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